ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

OLC 75-1054

S. 415

Department of Justice
Washington, D.C. 20530

STAT Mr. [redacted]
Central Intelligence Agency
Office of Legislative Counsel
Washington, D. C. 20505

STAT Dear Mr. [redacted]

This is submitted for your information pursuant to our telephone conversation today.

Please send us a copy of your report when it is available.

Sincerely,

David Bushong
Legislative Attorney
Office of Legislative Affairs

Enclosure

Typed: 5/8/75
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Honorable Abraham A. Ribicoff
Chairman, Committee on Government Operations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S.495, 94th Congress, 1st Session, a bill "to establish certain Federal agencies, effect certain reorganizations of the Federal Government, and to implement certain reforms in the operation of the Federal Government recommended by the Senate Select Committee on Presidential Campaign Activities, and for other purposes."

S.495 consists of four titles. Each title covers two or more distinct (but related) subjects. For purposes of clarity in presentation this letter summarizes and discusses separately each of the various segments of S.495.

I

TITLE I. ESTABLISHMENT OF GOVERNMENT OFFICES

1. Office of Public Attorney (Sec. 101; pp. 1-12 of the bill).

The Proposal. Under Section 101 of S.495, title 28 of the United States Code would be amended by adding a new chapter creating the Office of Public Attorney. The gist of the new chapter would be the establishment of a permanent Office of Public Attorney, independent of the Department of Justice and entire executive branch, which would have the exclusive responsibility, most importantly, for investigating allegations of, and for prosecuting, violations of Federal campaign and election laws, and of corruption in the administration of the laws by the executive branch.

Three retired courts of appeals judges, selected for the purpose by the Chief Justice of the United States, would appoint the Public Attorney, by and with the consent of the Senate. He would serve five years and could be appointed for one additional term of five years. A vacancy in the Office would be filled in the manner of an original appointment. In order to qualify, an appointee would have to agree not to occupy or discharge the duties of any Federal elective office, or to accept any other Federal employment, for a period of five years after the conclusion of his tenure as Public Attorney.

Records
Chrono
Walsh

McNemar
Durham

Keeney
Hold

The Public Attorney would have investigative and prosecutory jurisdiction in respect to: (1) allegations of corruption in the administration of the laws by the executive branch; (2) cases referred to him by the Attorney General because of actual or potential conflicts of interest; (3) criminal cases referred to him by the Federal Elections Commission; and (4) allegations of alleged violation of Federal election laws.

The Public Attorney would be required to notify the Attorney General of the initiation and termination of investigations or proceedings within his jurisdiction. During the pendency of any such investigation or proceeding the Attorney General would be obliged to direct the Department of Justice not to conduct any investigation or prosecution, or to take any related action, with respect to the same subject matter, or any related or overlapping matter, except with the prior written approval of the Public Attorney. In addition, at any time the Attorney General believed or had reason to believe that an investigation conducted under his supervision involved or might likely involve a conflict of interest or matter otherwise within the jurisdiction of the Public Attorney, the Attorney General would be obliged promptly to notify the Public Attorney thereof. In any such event the Public Attorney would, at his discretion, either defer to the Attorney General's investigation, take over the investigation solely on his own responsibility, or participate with the Attorney General in the further conduct of the investigation.

If the Attorney General disapproved of the filing of any indictment or information, or of any subsequent action or position taken by the Public Attorney in the resulting judicial proceeding, the Attorney General would be entitled to appear and present his views amicus curiae to the court before which the proceeding was pending.

With regard to matters within his jurisdiction, the Public Attorney would be vested essentially with all the same powers the Attorney General (and United States Attorneys) now enjoy over such matters. Included would be the authority to direct Federal investigative agencies to collect evidence, to prosecute criminal cases from inception through the appellate processes, and to conduct civil proceedings to enforce, or to obtain remedies for violations of, the laws he is charged with enforcing.

The Public Attorney would also be authorized to establish a staff and exercise appropriate administrative controls, including the making of rules and regulations to carry out his duties and functions. His offices would be maintained physically apart from offices of the Department of Justice. All Federal departments and agencies would be obliged to make available to the Public Attorney, at his request, its services, equipment, personnel, facilities, and information, to the greatest extent practicable, consistent with law.

Section 1905 of title 18 of the United States Code, making punishable the disclosure of confidential information generally, would be amended by adding a provision to protect evidence and information obtained by the Public Attorney. Special penalty provisions would be attached.

Discussion. The Department of Justice opposes the establishment of an independent attorney to discharge responsibilities that properly belong to this Department. There are at least two bases for very substantial doubt whether the proposal is constitutional. Many of the provisions seem incomplete or impracticable. The Congress should, in our view, determine not to adopt this proposal for the same basic reason of governmental policy that persuaded the framers of the Constitution to create a single executive in the first place.

It would seem clear that the Public Attorney would be an officer of the United States. As such, he would have to be appointed pursuant to Article II, section 2, clause 2 of the Constitution. This provision is explained in United States v. Germaine, 99 U.S. 508, 509-510 (1878) as follows:

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices become numerous, and sudden removals necessary, this mode may be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

The proposed legislation does not appear to employ any of the prescribed methods for the appointment of the Public Attorney.

Inasmuch as the Public Attorney would be exercising the functions of the Attorney General and United States Attorneys, although in a limited sphere, it might be necessary that he be appointed, as those officers are, by the President subject to confirmation by the Senate. On the other hand, assuming for the sake of argument that the Public Attorney could be considered an "inferior officer" in the Constitutional sense, a serious question still arises whether the task of appointing could properly be given to a court. See Ex Parte Siebold, 100 U.S. 371 (1839). This legislation does not really vest the appointing power in a court in any event. It gives the power to three retired appellate judges selected solely for the purpose of making the appointment, and then appointment is made subject to the advice and consent of the Senate.

Since the Public Attorney would be exercising the powers of the Attorney General and United States Attorneys, a most substantial question arises as to whether this proposed legislation can be squared in any way with the Constitution's separation of powers. In this connection it must be emphasized that the problem here is cast in broader dimensions than the problem raised in 1973 with regard to legislation to create a Special Watergate prosecutor outside the executive branch. The distinctive question then was "whether the President ought to be able to control the persons responsible for investigating and prosecuting some of his closest and most trusted associates, and perhaps even himself." H. Rep. No. 93-660, 93d Cong., 1st Sess. 10 (1973). Even under those circumstances, in testifying before the Committee on the Judiciary of the United States Senate (November 14, 1973), Acting Attorney General Bork questioned whether the creation of an independent Special Prosecutor would be constitutional.

> "The constitutional problem arises, of course, because the Constitution of the United States makes prosecution of criminal offenses an Executive Branch function. The Constitution distributes the powers of the three branches of government and the only reference to prosecutorial powers is in Article II, Section 3, which states that the President 'shall take Care that the Laws be faithfully executed.' Article II, Section 2 gives the President 'Power to Grant Reprieves and Pardons for Offenses against the United States.' This power, too, indicates that the Constitution lodges in the Executive Branch complete control over criminal prosecutions. As Professor Roger Cramton has stated, although 'the nature and extent of this power has been disputed, there can be little doubt that functions placed in the four original federal departments -- conduct of foreign relations, command of the military, enforcement of the law, and collection of taxes -- are at the core of the Executive's authority.'"

The proposal to create a Special Prosecutor for Watergate and related matters was thought by some to be justified under the Necessary and Proper Clause of Article I, Section 8, of the Constitution. This gave rise to the question whether, under such reasoning, the Necessary and Proper Clause would not utterly eclipse the rest of the Constitution. As pointed out by Acting Attorney General Bork in his testimony before the Senate Judiciary Committee, the Necessary and Proper Clause is properly understood as constituting a means of making the exercise of the powers of the various branches effective, and not as a means of shifting powers between the branches of government. See also H. Rep. 93-660, 93d Cong., 1st Sess. 20-21 (Additional Dissenting Views) (1973).

Compared to the proposal to create a Special Prosecutor for Watergate, the proposal to create a Public Attorney is general legislation of much greater scope. It would completely arrogate to the Public Attorney the responsibility now vested in the Department of Justice for enforcing Federal campaign and election laws and all laws involving official corruption within the executive branch. A corrupt act by the lowest-ranked contracting officer in the Federal establishment would evidently be made the sole responsibility of the Public Attorney, to the exclusion of the local United States Attorney and the Department of Justice. It is difficult to believe that responsibility so long exercised by the executive branch can be split off and given to the Public Attorney in consonance with the Constitution. That would involve a restructuring, not of the executive branch, but of our Federal government.

There are certain independent agencies within our Federal government as to which rather distinctive principles of law apply, inasmuch as the agencies perform quasi-legislative or quasi-judicial functions. See, e.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). The proposed Office of the Public Attorney would clearly not be such an independent agency. Its function in prosecuting for Federal violations would be an executive function. See Ponzi v. Fessenden, 258 U.S. 254 (1922); United States v. Cox, 342 F.2d 167 (5th Cir., 1956), certiorari denied, 381 U.S. 935.

It is clear that a court cannot compel a United States Attorney to prosecute a particular case. United States v. Cox, supra. The rationale is that, since prosecution is an executive function, "it follows as an incident of the constitutional separation of powers that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions" (id. at 171). See also Smith v. United States, 375 F.2d 243 (5th Cir., 1967), certiorari denied, 389 U.S. 841. What the Court held about the power of the judicial branch should also be true about the power of the executive branch. The creation of a Public Attorney would represent, not merely an interference with, but an arrogation of the executive function. There should be no logical way for the two branches of government to combine, under this legislation, to instill a power that neither branch possesses into a neutral outside agency.

The provisions of S.495 with regard to the Public Attorney are, in various particulars, incomplete and impracticable. For example, there is no provision for removal of the Public Attorney. There is no provision for cases in which the Public Attorney has a conflict of interest to match the concern shown for cases in which the Attorney General has a conflict of interest. The Attorney General is given a right to object to the way the Public Attorney is handling a pending case in court, but the Public Attorney has no duty whatever to keep the Attorney General informed about his investigations or cases, except that he must give the Attorney General prior notice that an indictment or information will be filed.

The provision to allow the Attorney General to clash with the Public Attorney in the latter's cases in court is perhaps designed for situations in which the two attorneys view Federal statutes differently or follow differing prosecutive policies. But a court cannot decide questions of executive policy. "The Constitution knows only one 'executive power,' that of the President, whose duty to 'take care that the laws be faithfully executed' thus becomes the equivalent of the duty and power to execute them himself according to his own construction of them." Corwin, The President: Office and Powers 100 (1948). The proposed legislation then cannot be saved by having the court resolve differences in policy between the two attorneys wielding executive power, for that is to give the judge executive power -- indeed, the very power presidents exercise personally when executive agencies conflict.

When a public official cannot discharge his duties because of a conflict of interest, he should divorce himself from the matter completely and assign it to another official to handle. Still, the proposed legislation would authorize the Public Attorney to decide what the Attorney General should do about a conflict of interest. While not explicit on the point, the legislation indicates that the Public Attorney could require the Attorney General to participate in a subservient role in the case. The provision is both improper and impracticable.

Pretermitting all legal issues about the description, the fact is that the Public Attorney would be a miniature president within his area of responsibility answerable to nobody for an initial term of five years (at least assuming good behavior).

The question whether to have a single or divided executive was strenuously debated in the Constitutional Convention of 1787. The chief proponent of a "vigorous executive" was James Wilson of Pennsylvania. Wilson argued for "a single magistrate, as giving most energy, dispatch and responsibility to the office." Morison, The Oxford History of the American People, p. 306 (1965); Bowen, Miracle at Philadelphia, pp. 52-65 (Bantam 1968). Subsequently, arguing for the ratification of the proposed constitution, Alexander Hamilton wrote in Number 70 of the Federalist Papers:

> "[T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power. First. The restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment, in cases which admit of it."

The people of the United States hold the President and, in turn, the political party he represents, responsible for the fair and effective administration of the laws. Shouldered with such a responsibility the President should not be deprived of the means to discharge it. This tradition of holding the President and his party responsibile cannot readily be broken. Creation of a Public Attorney, if constitutionally possible, is a step to be taken only with the greatest caution and would portend possible future diffusion of the executive power. The framers of the Constitution, after all, feared a monarchical presidency less than a fragmented one. The lesson of recent history is that, even under circumstances involving the highest offices in our government, the necessary power can be wielded under a single executive, utilizing regulations of this Department to create an office analogous to the one this legislation would create for some extremely broad purposes. For the many reasons indicated, this Department is strongly opposed to the creation of an Office of Public Attorney.

2. Congressional Legal Counsel (Sec. 102; pp. 12-19).

The Proposal. Under Section 102 of S.495, a Congressional Legal Service would be established under the direction and control of a Congressional Legal Counsel. The Counsel would be appointed by the Speaker of the House of Representatives and the President pro tempore of the Senate from among recommendations submitted by the majority and minority leaders of both Houses.

Upon the request of either House of Congress, a joint committee of Congress, any committee of either House, at least three Senators, or twelve members of the House of Representatives, the Counsel would be required: (1) to render legal advice about questions arising under the Constitution or Federal laws (such as whether denial of a request under the Freedom of Information Act was proper, whether nominations or international agreements should have been submitted to the Senate for its advice and consent, whether executive privilege is properly asserted, whether acts or omissions by exective branch officials were lawful, and whether deferrals of budget authority were proper) and to institute civil actions to require executive officials to act in accordance with law; (2) to advise, consult, and cooperate with private litigants in suits against executive branch officers or employees respecting their execution of the laws; and (3) to intervene as amicus curiae, as a matter of right, on behalf of those making an appropriate request in any Federal, State or local proceeding involving an issue as to the constitutionality, interpretation or validity of any Federal law, proceeding, or official action, including actions taken by the Houses or committees of Congress.

Furthermore, the Congressional Legal Counsel would be required, upon request, to represent either House of Congress, a joint or other committee of Congress, a Member, or any officer, employee, or agency of the Congress in any

legal action to which it is a party and the validity of its action is placed in issue. Upon written notice by the Congressional Legal Counsel, the Attorney General would be relieved of responsibility and authority in the matter.

Discussion. If the Congress wishes to establish a Congressional Legal Service to give purely legislative assistance, e.g., of the kind that has been rendered by committee counsel and staff, it is clearly entitled to do so, and the Department of Justice would not presume to advise on the matter. The proposal goes well beyond that, however, and raises extremely difficult questions, both of propriety and of constitutional law.

Problems in the nature of conflict of interest would abound under this proposal. For example, after an appropriate Congressional request, the Congressional Legal Counsel would be obliged to advise, consult, and cooperate with private litigants in suits against executive agencies or officials regarding the execution of Federal laws; but such litigation can be multi-party or involve a series or number of suits. If, e.g., the issue was whether an executive officer's action was ultra vires, one private suitor could be interested in the affirmative and another in the negative, and the United States could be a litigant denying the authority of its own officer. The legislation does not show clearly whether the Counsel must always advocate against the executive, or in support of Congress as the issues may require, or as his best judgment dictates, but any counsel is essentially an advocate, and the Congressional Legal Counsel could serve only one side in any case or series or groupings of cases. Embroiled in litigation involving an apparent conflict in the provisions of two or more Federal statutes, the question might arise whether the Counsel was more devoted to the private litigant or to an element of the Congress.

In our view the creation of a Congressional Legal Counsel under this proposal would be very unwise as a matter of fundamental government policy. The legislation would impose a duty to advocate, but the Counsel would not be able to represent majority and minority views of the Congress, and he could not lend assistance to one litigant without risking resentment or misunderstanding by other litigants not receiving his help.

Furthermore, the position of the Congress as a deliberative body might be jeopardized under this proposal. The customary way for Congress to fix the content of Federal law is to enact or to amend legislation, rather than to have an attorney seek to win a certain judicial construction of the law. Members or committees of Congress triggering action by the Congressional Legal Counsel might risk a certain identification with the litigation; and if the Legal Counsel lost his argument and remedial legislation was proposed, a question could arise as to whether those opposing the legislation could receive the same kind of hearing as when members or committees have not become so directly involved.

It is also rather clear that the proposed legislation contemplates the taking by the Congressional Legal Counsel of an enforcement role that has traditionally been handled exclusively by the executive branch. Your committee might wish to consider the following, given in testimony on similar legislation by the late Alexander M. Bickel of the Yale University Law School:

> "To be sure, appearances as amicus in behalf of Congress, such as are provided for * * * in the version of the bill that I have seen, have been fairly customary where an interest of the Congress separable from that of the Executive, and not subsumed in the Executive's duty to take care that the laws are faithfully executed, is present. [See 2 U.S.C. 118.] But I think it is constitutionally very dubious, and in any event quite unwise, to have Congress represented, either as amicus or of right, by its own lawyer in any case in which the validity or interpretation of an act of Congress is involved. * * *
>
> "Enforcement of the law is part of its execution, and litigating its constitutionality or interpretation is part of its enforcement. I do not think Congress can take over or, as of right, share these functions. * * *
>
> "What Congress does sorely need, it seems to me, by the name of Legislative Attorney General or any other name, is an officer whose duty it would be routinely to review actions of courts and of administrative agencies which lay bare, as they do by the dozen each year, points of policy either omitted or made insufficiently clear in existing legislation. Such an officer could take the initiative in starting up the legislative process to supply omissions in existing legislation, or to review questionable constructions of existing legislation. He could present Congress at each session with an agenda of necessary law revision. By thus systematically coordinating the work of Congress with that of the courts and of the administrative agencies, such an officer could vastly enhance the policy-making authority of Congress.

> "Some four decades ago, the late Justice Cardozo proposed creation in New York of what he called a Ministry of Justice, and what became, in New York and in one or two other States, a law revision commission. It offers no perfect analogy to what I have in mind here, for it answered to purposes that are not all relevant. But a fruitful general analogy it does present, I believe. 'Today,' Cardozo said, 'courts and legislatures work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product.'
>
> "There is too much separation and aloofness today also between courts and administrative agencies and the Executive, on the one hand, and Congress on the other, and much policy made in the former that should be laid down by the latter. The default of Congress is owing in some measure to separation and aloofness. An officer whose function it is to put before Congress regularly and systematically problems unearthed by litigation, and temporarily solved by courts and administrative agencies, might do much to enable Congress to see to it that the policy that is pursued by the Federal Government is the policy Congress wants." Separation of Powers, Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 90th Cong., 1st Sess. 249 (1967). (Emphasis supplied.)

From the Department's viewpoint, the proposed legislation clearly involves the lodging of executive branch powers in an agent of the Congress. We can see no basis for such legislation. To be sure, the Congress has a vital interest in the way the President construes, applies, and enforces the law, but its function should be kept entirely legislative.

Beyond the question whether the proposed legislation involves a usurpation of the executive power is the question whether, as the bill provides, appointment of the Congressional Legal Counsel can validly be made by the Speaker of the House and the President pro tempore of the Senate. While officers of the House of Representatives are appointed under Article I, section 2, of the Constitution, and officers of the Senate under Article I, section 3, of the Constitution, these provisions would not seem applicable to joint Congressional officers. Since Article II, section 2, of the Constitution refers to "all officers of the United States," and the term includes more than officers of the executive branch, it would seem that the Congressional Legal Counsel would have to be appointed according to the provisions of Article II, section 2.

Legislative precedent supports the view that the Congressional Legal Counsel would have to be appointed in accordance with the provisions of Article II, section 2. The Comptroller General, the Librarian of Congress, and the Public Printer are appointed by the President with the advice and consent of the Senate (31 U.S.C. 42, 2 U.S.C. 136, 44 U.S.C. 301); and the Architect of the Capitol is appointed by the President alone (40 U.S.C. 162). The proposed legislation, of course, does not utilize a method of appointment prescribed in Article II, section 2. If it would be anomalous (and we believe it would) to have the Congressional Legal Counsel appointed under Article II, section 2, see Ex Parte Siebold, 100 U.S. 371 (1839), and there is no other way, the reason could be that the Office is not constitutionally possible.

Question must be raised finally with regard to the provisions to do away with the requirement of standing in certain cases where the Congressional Legal Counsel intervenes or files a brief amicus curiae, or when he institutes a civil action on behalf of Congress to compel executive action (in which event standing is not required "where an actual case or controversy exists"). See Section 102(d)(1) and (2) of the bill. The problem here is that the question of standing and the question of whether a case or controversy exists are fused questions. Standing is more than a judicially imposed rule; it is an element in determining whether judicial power is properly invoked. Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968). To the degree then that standing is a constitutional requirement, it is not subject to dimunition by legislative action, and the effect of the provisions in the legislation to do away with the standing requirement must be called into question.

II

TITLE II. GOVERNMENT PERSONNEL

1. Financial Disclosure Requirements for President and Vice President (Section 201; pp. 19-22).

The Proposal. Under Section 201 of S.495, summarized briefly, the President and Vice President of the United States would be required to file annual reports with the Comptroller General, containing a full and complete statement concerning such financial matters (including those in which a spouse is joined) as the amount of any Federal, State or local income or property taxes paid, the amount and source of all items of income and reimbursements for expenditures, the amount of gifts received other than from the immediate family, the identity of all assets held, all transactions in securities and commodities (including those made by any person acting on his behalf or pursuant to his direction), and purchases and sales of real estate

other than personal residences. It is provided for the most part that matters involving less than a certain amount of money need not be reported; but the President and Vice President would be required to report, without any limitation at all, "any expenditure made by another individual for the personal benefit of him or his spouse." The reports filed with the Comptroller General would be made public records.

Discussion. The one provision which is quoted above is manifestly too broad; no President or Vice President could properly be expected to account for every hospitality shown him. Also, the provision for reporting securities transactions made on the official's behalf could prevent any future use of a "blind trust" arrangement by a President or Vice President. The provision for making the reports public may be contrasted with the provision of the Senate Rules that the financial statements be submitted to the Comptroller General in sealed envelopes to be opened only by order of the Select Committee on Standards and Conduct in the event of an investigation for an alleged violation of the rules. Sen. Doc. No. 93-1, 93d Cong., 1st Sess., Rule XLIV, pp. 64-66. Such questions as the extent to which, and the circumstances under which, public officials should enjoy a right to privacy, and a number of other questions, we believe, need to be thought through completely, and any resulting legislation rationalized from the standpoint of the public interest, fairness to the individual, and the existence of comparable (although not necessarily identical or statutory) requirements for all branches of government. The Department is opposed to this segment of S.495 in its present form.

2. Prohibiting Campaign Solicitations by Appointees Confirmed by the Senate and Executive Office Personnel (Sec. 202; pp. 22-24).

The Proposal. Under Section 202 of S.495, Section 7323 of title 5 of the United States Code would be amended, primarily by the addition of a new paragraph (b) under which any employee in an executive agency who is appointed by the President, by and with the advice and consent of the Senate, or is paid from the appropriation for the Executive Office of the President, would be prohibited from requesting or receiving from anyone a thing of value for political purposes at any time while so employed and for one year immediately after each time he is no longer so employed. An employee violating 5 U.S.C. 7323 would be removed from the service. Also, under Section 202 of S.495, Section 602 of title 18 of the United States Code would be amended so that its criminal penalties would be applicable to violations of the new paragraph (b) of 5 U.S.C. 7323.

Discussion. The basic objection to the proposed new paragraph in 5 U.S.C. 7323 is that it is too broad. Whereas the section now covers solicitation of political contributions by one Federal official of another, or of a Member of Congress, or military officer, the new provision would cover solicitation of campaign contributions "from anyone." This may also be contrasted with the provisions of 18 U.S.C. 602, regarding the solicitation by Members of Congress, candidates, or Federal employees of political contributions "from any other such officer, employee, or person" (emphasis added). The concern here is not so much to keep a close parallel between the various provisions but rather to make certain that any provision adopted will not interfere with ordinary and well accepted campaign practices.

Your Committee will recognize that, as a practical matter, a President must have members of his Cabinet or other high-level administration officials perform various political functions in his stead. They will be required frequently to ascertain the public's views on particular problems and to explain and defend administration decisions and policies. They may do this before the general public, before organized groups, independent political organizations, or Party rallies; and they may also be active in campaigns. Yet the proposal would seem to prohibit all requests such officials might make for political contributions. That would be unjustifiable. Legislation should surely not inhibit administration officials from making public requests for political contributions when those same officials make public requests for political support generally. Furthermore, the proposal would seem to prevent an administration official from resigning and seeking public office within the year, in which event he would certainly need to solicit campaign contributions. In the Department's view, the proposed legislation is much too broad to be justifiable.

3. Application of the Hatch Act to the Department of Justice (Sec. 203; p. 24).

The Proposal. Under Section 203 of S. 495, Section 7324 of title 5 of the United States Code would be amended to remove an existing exception and thereby to make the restrictions of the Hatch Act upon political activity apply to the Attorney General, Deputy Attorney General, and Assistant Attorneys General.

Discussion. We believe, partly on the basis of a 1967 report of the Commission on Political Activity of Government Personnel, that there is no institutional reason sufficient to justify this proposal. Indeed, the trend in thinking about the Hatch Act has been toward narrowing as much as possible the limitations placed upon the freedom of governmental employees to be politically active. At the very least, it would seem that new limitations should not be created without compelling reasons for doing so. However, because the primary effect of the proposal would be upon high officials of the Department personally, the Department will take no formal position on the proposal.

4. Intelligence Activities by Personnel of the Executive Office of the President (Sec. 204; pp. 24-25).

The Proposal. Under Section 204 of S. 495, a new section would be added at the end of Chapter 2 of title 3 of the United States Code, which would provide that any person employed by or detailed to any agency of the Executive Office of the President (including the White House Office), who is compensated from appropriated funds, shall not, directly or indirectly, engage in any investigative or intelligence gathering activity concerning national or domestic security unless specifically authorized to do so by statute.

Discussion. The intendment of this proposal is unclear. In its larger aspects it would seem to require the President of the United States either personally to review and supervise investigative and intelligence gathering activities, or to rely upon officials outside the Executive Office or non-compensated advisers to lend any desired assistance. We believe that the President should be able to utilize his staff as he feels necessary, and not be forced, for example, to deal personally or exclusively with the agency actually doing the investigation or intelligence work. Perhaps the purposes behind this proposal could be served essentially by requiring that the activity and involvement of the Executive Office be expressly authorized by the President. In any event the proposal is objectionable in its present form.

5. Interference with Elections by Government Employees (Sec. 205; p. 25).

The Proposal. Under Section 205 of S. 495 the penalties for violations of 18 U.S.C. 595 (interference in political activities by administrative employees) and 18 U.S.C. 600 (promise of employees or other benefit for political activity) would be increased. Now punishable at the maximum by fine of $1,000 and imprisonment for one year, the offenses would be punishable under the amendment at the maximum by fine of $25,000 and imprisonment for five years. In addition, 18 U.S.C. 595 would be broadened so as to be applicable to persons employed in administrative capacities in connection with activities financed in whole or part by subsidies or any other payments (including payments under contract) made by the Federal Government.

Discussion. The Department has no objection to this proposal.

6. Disclosure of Request for Tax Audit (Sec. 206; pp. 25-27).

The Proposal. Under Section 206 of S. 495, summarized briefly, the Secretary of the Treasury or his delegate would be required (under an amendment adding a section to the Internal Revenue Code) to make annual reports to certain specified committees of the Congress, detailing requests made by the President or an officer or employee of the Executive Office for information or an investigation with respect to the liability for tax of any taxpayer. The requests would have to be in writing and maintained on file by the Secretary. In handling such requests the Secretary would be required to disclose only the name of a person or group and the general nature of an investigation if he determined "that further disclosure will prejudice the rights of the person or group or the effective and impartial administration" of the internal revenue laws.

Discussion. This Department does not oppose the provisions for the maintenance of records and the reporting of requests for tax information, but the Department must object strenuously to the remainder of the proposal. It would be improper, incongruous, and impracticable to charge the Secretary of the Treasury with the responsibility of determining (probably upon very inadequate information) whether a disclosure would prejudice the administration of the tax laws or the rights of an individual taxpayer, and of then refusing a Presidential request on such basis regardless of the considerations that may have impelled the President

to seek the information. More is said about this general matter in the discussion immediately below.

7. Access to Tax Returns (Sec. 207; pp. 27-28).

The Proposal. As pertinent, Section 6103(a) of the Internal Revenue Code now provides, in brief, that tax returns constitute public records but may be disclosed only upon orders, rules or regulations made or approved by the President. This section would be amended (under Section 207 of S. 495) to delete the references to the President and to make disclosure depend upon rules and regulations made by the Secretary of the Treasury or his delegate. The section would be further amended by the addition of a paragraph, which would essentially repeat the provisions discussed above regarding disclosure of returns at the request of the President or officers or employees of the Executive Office.

Discussion. The proposal is evidently designed to make the Secretary of the Treasury the supreme policy-maker, independent of the President, regarding disclosure of tax returns. Whether the proposal would really have such an effect may be doubted, but this Department objects to the proposal in any event as a matter of principle. In our view, problems in domestic government cannot and should not be solved by legislation to fragment the executive power.

The fact remains that there may be purposes underlying these proposals that deserve to be accomplished. As your Committee is aware, several bills were introduced during the 93rd Congress and legislation is pending now to limit the utilization of tax returns and tax return information. The Department of Justice recognizes the need for developing a measure that would strike a proper balance between such considerations as the rights of privacy of taxpayers and the legitimate needs of society. It is also recognized that effective controls should exist to insure that disclosure of tax returns are indeed made for official purposes and within accountable channels of government. As indicated by Deputy Attorney General Tyler in testifying on April 21, 1975, before the Subcommittee on the Administration of the Internal Revenue Code of the Senate Committee on Finance, the Department of Justice supports legislation in this general area and would be pleased to work with all interested parties in developing a properly balanced measure. Proposals like those in S. 495 that focus upon limiting the authority or role of the President in administering the laws do not, in our view, represent an appropriate solution.

III

TITLE III. CONGRESSIONAL ACTIVITIES

1. Jurisdiction To Hear Certain Civil Actions Brought By The Congress (Sec. 301; pp. 28-29).

The Proposal. Under Section 301 of S. 495, chapter 85 of title 28 of the United States Code would be amended by adding a new section that would give the District Court for the District of Columbia, regardless of the sum or value of the matter in controversy, original jurisdiction over any civil action brought by either House of Congress, any committee of either House, or any joint committee, to enforce or secure a declaration concerning the validity of any subpoena or order issued by such House or committee, or by any Congressional subcommittee, to the President, Vice President, or any officer or employee of the executive branch to secure the production of information, documents, or materials. Ancillary provisions in the new section would, e.g., authorize the suit to be brought by the House or committee in its own name or in the name of the United States and by such attorneys as it might designate.

Discussion. The intent of this proposal is quite properly not to legislate any solutions but rather to involve the courts in resolving the many sensitive problems that can arise between the Congress and the Chief Executive over claims of executive privilege and related matters. The key (in our view) to a proper consideration of this proposal lies in an appreciation of the extraordinarily difficult problems involved and practicable limitations upon the exercise of judicial powers.

That there is implicitly rooted in the Constitution of the United States an executive privilege of confidentiality, "fundamental to the operation of government and inextricably rooted in the separation of powers," was recently recognized by the Supreme Court in United States v. Nixon, 418 U.S. 683, 708 (1974). Yet the Court held in the case that the need for demonstrably relevant and material evidence in a criminal proceeding prevailed over an assertion of a generalized interest in confidentiality. The Court emphasized that the executive privilege is "weighty indeed and entitled to great respect" (id. at 712) and pointed out that the case before it involved only a particular conflict; the Court was not concerned with weighing and balancing other competing interests in other contexts, as e.g., in civil litigation, or when Congress demanded information, or where the executive asserted an interest in preserving state secrets (id. at 712, fn. 19).

Asking the courts to weigh the competing interests of the executive and legislative branches when executive privilege is asserted in response to a Congressional subpoena would be putting the courts in a most sensitive and unusual position. It is perhaps significant that, while precedents for the exercise of executive privilege go back to the presidency of George Washington, there has been an avoidance of the proposed system for fixing the boundaries and dispatching the disputes as they arise. The best system is the one that exists now. As stated by Attorney General Levi in addressing the Association of the Bar of the City of New York on April 28, 1975:

> In many governments, the question of which governmental body shall have the authority to determine the proper scope of the confidentiality interest poses no problem. Under our Constitution, however, the answer is complicated by the tripartite nature of the federal government and the doctrine of the separation of powers. But history, I believe, has charted the course. For the most part, we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the other branches and to the public. Competing claims among the branches for information have been resolved mainly by the forces of political persuasion and accommodation. We have placed our trust that each branch will exercise its right of confidentiality in a responsible fashion, with the people as the ultimate judge of their conduct.

Taking the above further, we commend to the Committee a law review article written by Professor Paul A. Freund of Harvard Law School as a forward to a survey of the decisions of the Supreme Court during its 1973 Term. The forward is entitled, "On Presidential Privilege," and we quote extensively from it, at 88 Harv. L. Rev. 13, 36-39 (with underscoring added):

> The issue of executive privilege is one aspect of a reexamination by Congress of the larger subject of relations between Congress and the President. A rationalization of congressional procedures, long overdue, has been seen as a necessary element in congressional oversight. The purse and the sword are the instruments of national policy that have been of most acute concern to Congress, and in each of these fields new legislative controls have been devised.

Out of these recent efforts a pattern seems to be emerging, one that would replace the isolation of the two branches, their unilateral acts and recriminations, with a procedure for consultation and for informed review by Congress. With respect to presidential impoundment of appropriated funds, a statute now requires the President to communicate his reasons to Congress, which in turn must approve the impoundment (if it constitutes more than a deferral) as a condition of its becoming effective. With respect to military action, the War Powers Resolution of 1973 recognizes the power of the President to commit troops to hostilities abroad in certain emergencies without a declaration of war, but requires a ratifying vote by Congress within sixty days. A like proposal regarding presidential proclamations of states of national emergency is before Congress.

Similar procedures for dealing with executive privilege are under active consideration. In general, the proposals would require an executive department to furnish any information or records within thirty days of receipt of a request from a House or committee of Congress, unless the department can supply a statement signed by the President explaining why the material is privileged. Some of the proposals would detail the grounds which the President could legitimately advance for nondisclosure: the need to withhold, for example, military secrets, other information whose disclosure might create grave and irreparable harm to the vital interests of the United States, and advice and opinions concerning policy in relation to legitimate functions of government. Provision for limited disclosure, as in executive session, might further narrow the scope of the privilege, just as such a provision might warrant a request for otherwise privileged investigatory files in connection with appointments and removals.

All such efforts to provide standards and procedures are laudable, though experience with the Freedom of Information Act, applicable to private demands for information, cautions against seeking clear and distinct solutions by codification. The efforts are nonetheless praiseworthy because they compel closer attention to standards which serve the public interest, recognize the need for restraint both in the demand for information and in the assertion

of privilege, encourage rational communication between the two branches, and furnish a basis for more informed public judgment if in the end confrontation occurs.

The more troublesome question is whether, if an impasse does develop, resort should be had to the courts. Given the widespread and appreciative acceptance of the courts' role in resolving the contest over production of the tapes [United States v. Nixon, 418 U.S. 683 (1974)], it seems natural enough to turn to the judiciary for settlement of congressional-presidential disputes as well. There are, however, significant differences that counsel against an easy transference of judicial review. The tapes case arose in the setting of a criminal proceeding. That factor gives rise to three distinctive characteristics that bear on the appropriateness of judicial review. In the first place, there was a conventional case already lodged in the court, not a plenary proceeding between two branches of government. Second, and related to the first characteristic, is the fact that private interests of the most acute kind -- the potential loss of liberty of the defendants -- were at stake. Third, the weighing of the need for disclosure is more congruent with the judicial function, and more comfortably performed, in a criminal case than in a legislative investigation: relevance and materiality are more focused in the search for defined facts than in a wide-ranging inquiry either to furnish a basis for legislation or to probe into maladministration.

If a prosecution were brought against an executive officer for contempt of Congress in refusing to give evidence or produce records, or if a House itself committed an officer to custody on that ground, a court ought not to refrain from deciding the issue; basic personal rights would have been put in jeopardy by a solemn act of the legislative body. Short of that kind of collision, at the very least there ought to be a considered resolution of the full House before a legislative committee would seek, and a court would provide, judicial review. But adoption of such legislation at this time may be premature. The whole subject of executive privilege is under close scrutiny; executive cooperation is likely to be more forthcoming, and Congress, for its part, is sensitive to criticisms of past excesses of some of its committees. A pattern

> of communication and better understanding, together with the force of public opinion, ought to be allowed to have its day. Routine resort to the courts could stunt these promising developments, draw the judiciary into intragovernmental controversies in their raw, politically-tinged state, and expose the courts to the risk of rendering unsatisfactory judgments on matters where the judicial touch is likely to be unsure. Here, as elsewhere in our constitutional order, when personal rights are not in jeopardy, it is well to give scope for "a frank and candid co-operation for the general good." The vision may be too ideal, the hope misplaced. But in the freer and healthier atmosphere into which we are emerging the vision and the hope deserve a trial.

For these reasons, the Department opposes enactment of the proposed legislation.

2. Perjury before Congressional Committees (Sec. 302; pp. 29-30).

Under Section 302 of S.495, Section 1621 of title 18 of the United States Code would be amended by adding a provision so that the absence of a quorum would not be a defense in a prosecution for perjury before a Congressional tribunal. Also, Section 1623 of title 18 would be amended to cover the making of false declarations in Congressional proceedings. The Department of Justice has no objection to this proposal.

3. Testimony before Senate Committee (Sec. 303; pp. 30-31).

Under Section 303 of S.495, Section 133A(b) of the Legislative Reorganization Act would be amended to govern the matter of having Senate committee hearings open to the public and of the broadcasting of such hearings. The Department defers entirely to the Congress on this type of proposal.

IV

TITLE IV. FEDERAL ELECTION CAMPAIGN ACTIVITIES, CONTRIBUTIONS, AND CRIMINAL SANCTIONS

1. Federal Tax Incentives for Campaign Contribution (Sec. 401; pp. 31-32).

Under Section 401 of S.495, the provision in Section 218 of the Internal Revenue Code relating to the deduction for contributions to candidates for public office would be repealed, and Section 41 of the Code would be amended to provide for certain tax credits for campaign contributions. The Department of Justice defers to the Department of the Treasury on this proposal.

2. Penalty for Illegal Campaign Contributions (Sec. 402; p. 32).

The Proposal. Under Section 402 of S.495, Section 610 of title 18 of the United States Code would be amended with regard to the penalties imposable against individuals involved in the giving or receiving of illegal campaign contributions or expenditures made by corporations or labor unions. At present, 18 U.S.C. 610 distinguishes between willful and non-willful violations, treating willful violations as felonies (punishable at the maximum by a $10,000 fine and imprisonment for two years) and non-willful violations as misdemeanors (punishable at the maximum by $1,000 fine and imprisonment for one year). The amendment would do away with such a distinction. Under the amendment any official of a corporation or labor organization who consented to the illegal campaign contribution or expenditure, and any person who accepted or received the illegal contribution, would be punishable upon conviction, at the maximum, by a $50,000 fine and imprisonment for two years.

Discussion. In the view of this Department, the ends of justice are well served by treating non-willful violations of 18 U.S.C. 610 as misdemeanors. While an increase in the available fines might be appropriate, the Department would otherwise prefer that the section not be amended as proposed.

3. Unlawful Use of Campaign Materials (Sec. 403; pp. 32-33).

The Proposal. Under Section 403 of S.495, Section 612 of title 18 of the United States Code would be amended by adding a provision that would, in brief, make the theft of campaign materials from persons seeking election to Federal office punishable, at the maximum, by a $5,000 fine and imprisonment for five years. The campaign materials, documents, and papers protected under the amendment would be those which "are not available for public dissemination."

Discussion. The proposal is evidently intended, considering the caption used, to prevent certain unlawful uses of stolen campaign materials. While a certain breadth may be desirable, the provision would be improved by defining the purposes that must actuate the theft in order for a criminal violation to arise. Basically, however, viewed as legislation to protect Federal campaigning rather than property interests, the Department has no objection to the proposal.

4. Criminal Sanctions Generally (Sec. 404; pp. 33-37).

The Proposal. Under Section 404 of S.495, chapter 29 of title 18 of the United States Code would be amended by adding five new criminal provisions.

a. Use of funds to finance violation of provisions of Federal election laws (p. 34). Summarized briefly, it would be made a felony under a new section for any person to compensate another for violating Federal election laws or for engaging in any activity which the person giving the compensation knows, or has reason to know, will probably result in any such violation.

Discussion. The Department believes that any case that might successfully be prosecuted under this new provision could be successfully prosecuted under existing law. The person compensating the actual perpetrator would be punishable as a principal under 18 U.S.C. 2 and might also be punishable for conspiracy under 18 U.S.C. 371. Under the new provision, depending upon the substantive offense involved, a higher fine might be authorized than is presently available, but basically there is no reason for enacting the new provision.

b. Contributions by certain other recipients of Federal funds (p. 34). Summarized briefly, it would be made a felony under a new section for any person receiving a Federal grant, loan, or subsidy of more than $5,000 in any calendar year to make a contribution during that year to any other person for any political purpose, and it would also be made a felony for anyone to solicit a contribution from a person who is receiving a Federal grant, loan, or subsidy and is therefore prohibited from making a contribution. Each officer and director of a corporation receiving such grants, loans, or subsidies would be considered to have received the entire amount received by the corporation during the calendar year.

Discussion. The Supreme Court of the United States has said, although in a different context, that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). In our view, this proposal is too expansive. It would broadly prohibit persons from contributing to political causes for the reason simply that they received certain Federal monies, whether or not there could be a connection between the two, such as might involve, e.g., the exertion of pressure upon the recipient to make the contribution. Similarly, many corporate officers and directors would be effectively forbidden to make personal contributions to political causes, since they would be regarded under the law as personally receiving the totality of any Federal grants, loans, or subsidies received by the corporation. Furthermore, there being no state of mind requisite to a violation of the provision, a person could solicit political contributions only at great personal risk; he would be in violation by seeking a contribution from a person whom he did not realize was receiving a Federal grant, loan, or subsidy of more than $5,000. This proposal would be enforceable only with the greatest legal and practical difficulty; consequently, the Department of Justice opposes it in its present form.

c. Fraudulent infiltration of Federal election campaigns for espionage and sabotage purposes (p. 35). Summarized briefly, it would be made a felony under a new section for any person, by any false or fraudulent means, to obtain employment, voluntary or paid, in a campaign for nomination or election to a Federal office, for the purpose of interfering with, spying on, or obstructing the campaign. A person would be similarly punishable for causing another to do the prohibited acts.

Discussion. The Department has no objection to the proposal. We would advise, however, that the provision covering a person who causes a violation be deleted as unnecessary. Without such a provision, a person would be punishable as a principal, under 18 U.S.C. 2, if he aids, abets, counsels, commands, induces, procures the commission of, or willfully causes the offense.

d. Misrepresentation of a candidate for elective office (p. 35). Summarized briefly, it would be made a felony under a new section for any person willfully to misrepresent himself as being a representative of a candidate for Federal elective office for the purpose of interfering with the election.

Discussion. This provision is similar to the recently enacted Section 617 of title 18 (Public Law 93-443; 88 Stat. 1268). If this proposal is not obviated by the new statute, the better course would be to consider amending the new statute.

e. Crimes affecting elections (p. 36). Summarized briefly, there would be a separate felony created under a new section whenever a person committed (1) any felony violation of the provisions of title 18 exclusive of chapter 29, for the purpose of interfering with, or affecting the outcome of, an election; or (2) any felony violation of State law for the purpose of interfering with, or affecting the outcome of, an election. The broad definition of "election" appearing in 18 U.S.C. 591(a) would be applicable to this new section.

Discussion. The proposal is similar to Section 1513 of S.1, the proposed Criminal Justice Reform Act of 1975. The proposal in S.1 is, however, limited to elections involving candidates for Federal office and would not apply to a purely State election. The Department supports the more limited scope of the offense in S.1 and notes that the broader reach proposed in S.495 may well exceed Federal legislative power.

5. Obstruction of Government Functions (Sec. 405; p. 37).

The Proposal. Under Section 405 of S.495, a new section would be added to chapter 47 of title 18, which would make it a felony for a person intentionally to obstruct, impair, or pervert a Government function by defrauding the Government or any department or agency thereof in any manner.

Discussion. Since much the same conduct can be reached now under existing law, the proposal is largely unnecessary but not entirely so. A similar provision is under consideration as Section 1301 of S.1, the proposed Criminal Justice Reform Act. The Department supports the proposal, although it would be more appropriately adopted as a part of a codification or revision of Federal laws.

V

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

A. MITCHELL McCONNELL
Acting Assistant Attorney General